

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**BODEGA LATINA CORPORATION  
d/b/a EL SUPER**

**Case 21-CA-183276**

**and**

**UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 324**

**BODEGA LATINA'S EXCEPTIONS  
TO THE DECEMBER 29, 2017 DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

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Bodega Latina states the following exceptions to the December 29, 2017 Decision of Administrative Law Judge Gerald M. Etchingham (ALJ) (JD(SF)-55-17) in the above-captioned case. Bodega Latina contemporaneously files its Brief in Support of Exceptions.<sup>1</sup>

### **Statement of the Case**

1. Bodega Latina excepts to the ALJ's conclusion that "[t]his case involves Respondent's *unlawful* denial of union employee Mireya Karina Beltran-Pineda's (Mireya's or Beltran's) request to receive accrued vacation hours pay to cover emergency medical leave in late March 2016," as unsupported by record evidence and contrary to Board law. (ALJ Dec. 1 (emphasis added); *see* evidence cited throughout Exceptions and Brief in Support of Exceptions.)

### **Background**

2. Bodega Latina excepts to the ALJ's finding that "Supervisor [Angelica] Lima first became responsible for matters at [Bodega Latina's] seven unionized stores including store #11 in Anaheim on the week of March 27th," as contrary to the record evidence. (Lima testified that she had responsibility for four unionized stores before gaining responsibility for the Anaheim store, but the ALJ used her purported lack of first-hand experience to discredit her testimony.) (ALJ Dec. 3; *see* Tr. 226:8-11, 227:21-228:4.)

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<sup>1</sup> Board Rule § 102.46(a) originally imposed a January 26, 2018 deadline for Bodega Latina to file its Exceptions and supporting brief. However, on January 22, 2018, the NLRB issued a Federal Register Notice "grant[ing], sua sponte, an extension of time to file or serve any document for which the grant of an extension is permitted by law. The terms of the extension are that for each day on which the Agency's offices are closed for all or any portion of the day, one day shall be added to the time for filing or service of the document." The NLRB remained closed for three days, from January 20 through the end of January 22, 2018. Therefore, Bodega Latina timely files this brief on January 29, 2018.

3. Bodega Latina excepts to the ALJ's finding that the store director approved requests for vacation pay as unsupported by the record evidence. (ALJ Dec. 4, 7, 8, 9, 21, 22, 25; *see* GC Exs. 2, 3, 9, 10; Tr. 95:5-24, 217:15-19, 134:21-24, 225:8-15, 259:11-260:2.)

4. Bodega Latina excepts to the ALJ's finding that, "[i]n practice, . . . in 2015 and 2016, a number of employees requested time off with vacation pay with less than 30 days' notice and these requests were all approved by the store's director/manager and paid to the requested employee within 1-3 weeks," as unsupported by the record evidence. (ALJ Dec. 4; *see* GC Exs. 2, 3, 9, 10; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 217:15-19, 225:8-19, 256:4-7, 259:11-260:2.)

5. Bodega Latina excepts to the ALJ's finding that the vacation pay settlement was "unrelated" to Beltran's vacation payout request as unsupported by the record evidence. (The settlement payment came days after Beltran's request.) (ALJ Dec. 5, 6, 16, 27 n. 26, 28; *see* Jt. 1; Tr. 92:3-9, 246:3-13; 248:2-16.)

6. Bodega Latina excepts to the ALJ's finding that "the settlement moneys were owed by Respondent to Beltran and other union employees since August 7, 2015," as unsupported by the record evidence. (The record evidence demonstrates only that the agreement was concluded on August 7 but does not reflect the terms of the agreement (including when payment was due) or any of post-negotiation coordination that occurred after the agreement to effectuate its payment.) (ALJ Dec. 5, 27 n.26, 28; *see* Jt. Ex. 1.)

7. Bodega Latina excepts to the ALJ's finding that "unlike Beltran here, Efrain B. and Succoro C. received accrued paid vacation hours from Respondent to cover their sick days off," as unsupported by the record evidence because the record contains no evidence as to the

circumstances of those employees' requests for paid vacation hours. (ALJ Dec. 6; Tr. 62:17-65:20.)

8. Bodega Latina excepts to the ALJ's finding that "Manager Luna's regular custom and practice was to use his discretion and always approved an employee's request for paid vacation time off made in less than 30 days before the start of paid leave," as unsupported by the record evidence. (Luna did not have authority to approve *payment* for time off and no evidence supports when the employees in GC Exhibits 9 and 10 first requested the time off.) (ALJ Dec. 7, 8; *see* GC Exs. 2, 3, 9, 10; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 180:11-20, 217:15-19, 225:8-19, 239:7-241:5, 256:4-7, 259:11-260:2.)

9. Bodega Latina excepts to the ALJ's finding that Store Director Jose Luna had authority to approve or deny requests for vacation payouts as unsupported by the record evidence and contrary to the ALJ's other findings and conclusions. (ALJ Dec. 7 ("All of these paid time-off requests were approved by Manager Luna despite their being requested with less than 30 days' notice to Respondent."), 8 ("Manager Luna had full authority to approve or disapprove store #11 employees' paid time-off requests."), 8 n.7, 9, 21, 22, 25, 26; *see* ALJ Dec. at 11 (finding that Luna told Beltran that he was going to ask HR to authorize the paid time off), GC Ex. 10 (containing different handwriting for the store director approval lines as from the lines for vacation hours available), Tr. 110:6-25 (Beltran testifying that Luna told her he needed to get approval from HR); *see also* GC Exs. 2, 3, 9; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 180:11-20, 217:15-19, 225:8-19, 239:7-241:5, 256:4-7, 259:11-260:2.)

10. Bodega Latina excepts to the ALJ's findings that management routinely approved paid time-off requests with less than 30 days' notice as unsupported by the record evidence. (No

evidence supports when the employees in GC Exhibits 9 and 10 first requested the time off.) (ALJ Dec. 7, 8, 9, 23; *see* GC Ex. 9, 10.)

11. Bodega Latina excepts to the ALJ's finding that "[t]he time-off request form does not give Respondent's corporate payroll office the same authority to approve, disapprove, or have the employee withdraw a time-off request as is given to the specific store's director/manager like Manager Luna," as contrary to the record evidence (ALJ Dec. 7; *see* GC Ex. 9 (store director seeking vacation approvals from the payroll department, payroll employee approving employee vacation requests, and payroll employee instructing the store manager to "submit vacation request form"); GC Ex. 10 (time off request forms stating that the vacation hours available must be "Per Payroll dept. email" or similar and reflecting different handwriting than the remainder of the form suggesting someone other than the store director completed that portion; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 180:11-20, 217:15-19, 225:8-19, 239:7-241:5, 256:4-7, 259:11-260:2.))

12. Bodega Latina excepts to the ALJ's finding that "on March 22 ... Manager Luna first denied Beltran's paid time-off request" and then "he rejected it a second time on March 25 or 26 in his telephone call to Beltran when she was at home recovering from her March 23 surgery," as contrary to the record evidence and the ALJ's other findings because no evidence supports that Luna denied Beltran's "time-off request twice." (ALJ Dec. 8 n.9, 17 n.19; *see* ALJ Dec. 12; GC Ex. 4; Tr. 19:9-22:19, 42:19-43:12, 110:6-111:20, 153:4-24, 178:12-179:24, 226:22-227:15; 232:13-18, 233:16-19.)

13. Bodega Latina excepts to the ALJ's finding that "employees, except Beltran, were routinely being paid their unused accrued vacation pay in March and April despite Respondent's settlement with the Union Locals and Respondent's eventual undisclosed payments to employees

on April 8 and June 24,” as unsupported by the record evidence and because none of those paid time-off requests were like Beltran’s vacation payout request. (ALJ Dec. at 9; *see* GC Exs. 2, 3, 9, 10; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 180:11-20, 217:15-19, 225:8-19, 239:7-241:5, 256:4-7, 259:11-260:2.)

14. Bodega Latina excepts to the ALJ’s finding that “[n]one of the 18 above paid time-off vacation requests submitted less than 30 days out were ever denied after a Respondent store manager (mostly Manager Luna) approved them and submitted them for approval,” as unsupported by the record evidence (no evidence supports when the employee submitted such requests). (ALJ Dec. at 9; *see* GC Exs. 2, 3, 9, 10; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 180:11-20, 217:15-19, 225:8-19, 239:7-241:5, 256:4-7, 259:11-260:2.)

15. Bodega Latina excepts to the ALJ’s finding “that Respondent does not require that there be 30 days out for a paid time-off request to be routinely approved,” as unsupported by the record evidence (no evidence supports when the employee submitted the requests that the ALJ referred to). (ALJ Dec. 9; *see* GC Exs. 2, 3, 9, 10; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 180:11-20, 217:15-19, 225:8-19, 239:7-241:5, 256:4-7, 259:11-260:2.)

16. Bodega Latina excepts to the ALJ’s finding that the word “we” in GC Exhibit 6 means Luna and some other unspecified managers and that the word therefore meant that Luna had authority to approve vacation payouts as an unsupported assumption contradicted by the plain context of the email. (ALJ Dec. 21, 25; *see* GC Ex. 5 (referring to “we” and “us” in the context of the Company as a whole).)

#### **Beltran’s Vacation Payout Request**

17. Bodega Latina excepts to the ALJ’s finding that on March 22 Beltran “prepared a handwritten time-off leave request and submitted it to Manager Luna with her doctor’s note and

requested 2 weeks emergency medical leave under the FMLA,” as unsupported by the record evidence. (ALJ Dec. 10; *see* GC Exs. 1(g), 4; Tr. 19:9-22:19, 42:19-43:12, 178:12-179:24, 194:3-9, 197:4-8, 197:18-22, 232:13-18, 233:16-19.)

18. Bodega Latina excepts to the ALJ’s finding that “Beltran also received from Manager Luna a blank form to request time-off using her unused accrued vacation hours as compensation during her time-off,” as unsupported by the record evidence. (ALJ Dec. 10; *see* GC Exs. 1(g), 4; Tr. 19:9-22:19, 42:19-43:12, 178:12-179:24, 194:3-9, 197:4-8, 197:18-22, 232:13-18, 233:16-19.)

19. Bodega Latina excepts to the ALJ’s findings that Beltran’s surgery was an “emergency” and that “Beltran’s doctor ordered her to have surgery the next day on March 23,” as unsupported by the record evidence and contrary to the ALJ’s other findings. (ALJ Dec. 10; *see also* ALJ Dec. 12 n.13, 15, 17 n.19, 20, 27.) Beltran never testified that her surgery was an emergency, and the ALJ found that her doctor scheduled her for surgery the next day “so she did not have to wait several months for his next opening.” (*See* ALJ Dec. at 10.)

20. Bodega Latina excepts to the ALJ’s finding that Beltran gave “advance notice” of her absence as contrary to the record evidence and the ALJ’s other findings that she provided less than 24 hours’ notice. (ALJ Dec. at 10 n. 10; *see* Tr. 127:13-15.)

21. Bodega Latina excepts to the ALJ’s finding that Bodega Latina “stipulate[d] that Beltran filled out and submitted a time-off request on March 22,” as unsupported. (ALJ Dec. 10 n. 10, 21.) Bodega Latina’s counsel stated that “And my assumption is -- don’t hold me to it -- but my assumption is when we get there, she testifies, oh, I filled out this form, we’ll probably stipulate to that fact,” but never in fact stipulated to that fact because it did not come up. (Tr. 23:8-13.)

22. Bodega Latina excepts to the ALJ's finding that "Supervisor Ruiz estimated that the meeting lasted 3-5 minutes," or "at least 3 minutes" as unsupported by the record evidence. (ALJ Dec. at 10, 21; *see* Tr. 177:11-12, 183:13-20.)

23. Bodega Latina excepts to the ALJ's finding that "Supervisor Ruiz admits that he does not know if Beltran and Manager Luna had *communications* regarding her doctor's note from March 22 or whether or not there was a request for paid time off made by Beltran to Manager Luna," as unsupported by the record evidence. (ALJ Dec. 11 (emphasis added); *see* Tr. 197:4-8 (asking Ruiz whether he knew of any "*other* communications" (emphasis added); Tr. 19:9-2:19, 178:12-179:24.)

24. Bodega Latina excepts to the ALJ's finding that "Supervisor Ruiz does not refute Beltran's testimony that Manager Luna handed Beltran a blank time-off request form for her to fill out on March 22," as contrary to the record evidence. (ALJ Dec. at 11; *see* Tr. 197:19-22 (Ruiz testifying that he didn't give Beltran a time-off request form because she didn't ask for one); Tr. 178:17-179:6, 179:21-24 (Ruiz testifying that at no point during the meeting did he or Luna hand Beltran a time-off form), 194:3-9, 197:23-198:1.)

25. Bodega Latina excepts to the ALJ's finding that "at no time did anyone from Respondent tell Beltran or Perez that Beltran's March 22 time-off request had been granted and at no time prior to the filing of the *July* charge in this case, had anyone from Respondent informed Beltran and/or Perez that Beltran's March 22 time-off request had been paid to her by Respondent's unrelated April 8, 2016 settlement payment from the August 7, 2015 settlement between the Respondent and Local Unions," as contrary to the record evidence. (ALJ Dec. 12 (emphasis added); *see* GC 1(a) (first charge filed August 30, 2016), Jt. 2-4 (Bodega Latina



paying Beltran more than the one-week vacation pay she requested); Tr. 92:3-9, 127:13-15, 153:21-24, 246:3-13.)

26. Bodega Latina excepts to the ALJ's finding that "[l]ater on March 25 or 26, Perez called Beltran back after speaking to Supervisor Lima and told Beltran that he had spoken to someone in Respondent's HR department and that Respondent had agreed to pay Beltran for 1 week as accrued vacation pay," as contrary to the record evidence and the ALJ's other findings. (ALJ Dec. 12, 16 ("as HR had originally told Perez"); *see* ALJ Dec. 13 (Lima never heard of Beltran before March 28 and had never previously been asked to process a vacation payout request); GC. Ex. 4; Tr. 42:19-43:12, 153:4-24, 226:22-227:15, 232:12-18, 233:16-19.)

27. Bodega Latina excepts to the ALJ's finding that "Beltran did not receive her paid time-off vacation pay in a timely manner for these 23.26 unused accrued vacation hours as it was not contained in Beltran's April 1 paycheck," as contrary to the record evidence and the ALJ's other findings. (ALJ Dec. 14; *see* Jt. Ex. 2-3 (showing Beltran received pay for well more than 23.26 vacation hours on April 8, 2016).)

28. Bodega Latina excepts to the ALJ's finding that "Beltran did not receive the same payment within 1 to 3 weeks for her March 22 time-off request as other employees had when making the same requests," as contrary to the record evidence and the ALJ's other findings. (ALJ Dec. 14, 19; *see* Jt. Ex. 2-3 (showing Beltran received pay vacation hours on April 8, 2016, within 3 weeks of her request); GC Exs. 2, 3, 9, 10; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 180:11-20, 217:15-19, 225:8-19, 239:7-241:5, 256:4-7, 259:11-260:2, 86:7-13, 90:14-16, 245:22-25.)

29. Bodega Latina excepts to the ALJ's finding that Luna made a "forceful attack against Beltran" with an "antiunion email," as unsupported by the record evidence. (ALJ Dec.

14, 15, 17; *see* GC Ex. 6; Tr. 45:15-19, 106:18-22, 109:4-5, 112:24-113:8, 136:6-25, 137:1-5, 138:2-139:3, 225:8-15.)

30. Bodega Latina excepts to the ALJ's finding that "Supervisor Lima further admits that she did not know as of April 5 that Respondent was making its settlement payments for the August 7, 2015 settlement on April 8, 2016," as contrary to the record evidence. (ALJ Dec. 15; *see* Tr. 246:3-13 (Lima testifying she knew as of April 5 the payments were "coming very soon").)

31. Bodega Latina excepts to the ALJ's finding that "[a]t no time during the end of March or in April or May 2016, was Beltran paid by Respondent for her March 22 time-off request for her medical emergency leave from March 23-26, 2016, by applying Beltran's unused accrued vacation hours to Beltran's March 22 time-off request," as contrary to the record evidence. (ALJ Dec. 15; *see* Jt. Exs. 2, 3; Tr. 86:7-13, 90:14-16.)

32. Bodega Latina excepts to the ALJ's finding that the June 24, 2016 vacation payout was "random" as unsupported by the evidence and contrary to the ALJ's other findings. (ALJ Dec. 16 n.17; *see* ALJ Dec. 16, Jt. Exs. 1-4; GC Ex. 4; Tr. 86:1-6, 92:3-9, 246:3-13.)

33. Bodega Latina excepts to the ALJ's finding that "Respondent's June 24, 2016 payment to Beltran contained the same accrued unused vacation pay that Beltran requested be paid to her by her March 22 time-off request that Respondent had previously denied," as unsupported by the record evidence. (ALJ Dec. 16-17; *see* Jt. Ex. 1-4; GC Ex. 4; Tr. 264:17-265:7.)

34. Bodega Latina excepts to the ALJ's finding that "Respondent delayed payment of Beltran's March 22 time-off request for approximately 3 months until this June 24 payment," as

contrary to the record evidence. (ALJ Dec. 17; *see* Jt. Exs. 1-4; 239:7-241:5, 243:17-25, 245:22-25; 248:10-16.)

35. Bodega Latina excepts to the ALJ's finding that Luna did not leave Bodega Latina on April 7, 2016, as contrary to the record evidence. (ALJ Dec. 17 & n. 18; *see* R. Ex. 2, Tr. 136:6-13, 249:19-25, 252:21-253:2.)

36. Bodega Latina excepts to the ALJ's "reject[ing] Supervisor Lima's interpretation that Manager Luna's reference to Beltran being 'pro union' as not animus but, instead, meant that 'the Union would probably support her [Beltran's time-off] request' because Perez and the Union were already assisting Beltran by March 29," as unsupported by the record evidence where no evidence indicates that Luna knew about the Union's assistance to Beltran as of the date of his email. (ALJ Dec. 23; GC Ex. 5, 6.)

37. Bodega Latina excepts to the ALJ's finding that "Manager Luna's direct reference to Beltran being 'pro-union' is akin to his referencing Beltran's skin color or religious affiliation to Supervisor Lima in his email," and that "[i]t is direct evidence of Manager Luna's discriminatory intent and retaliation against Beltran's union activities," as unsupported by the record evidence. (ALJ Dec. 23; *see* GC Ex. 6; Tr. Tr. 45:15-19, 106:18-22, 109:4-5, 112:24-113:8, 136:6-25, 137:1-5, 138:2-139:3, 225:8-15, 235:20-24.)

38. Bodega Latina excepts to the ALJ's finding that "Manager Luna either denied the request himself or the March 22 request was denied based primarily on Manager Luna's input that Beltran is a pro union employee," as unsupported by the record evidence and contrary to the ALJ's other findings. (ALJ Dec. 23; *see* GC Exs. 2, 3, 9, 10; Tr. 95:5-24, 217:15-19, 134:21-24, 225:8-15, 236:13-237:7, 238:17-25, 239:7-241:5, 259:11-260:2.)

39. Bodega Latina excepts to the ALJ's finding that "[i]t is unreasonable to believe that general counsel Angulo has responsibility for day-to-day approval of Respondent's over 2,600 employees' time-off requests," as unsupported by the record evidence, improperly equating time-off requests with vacation payout requests, and contrary to the ALJ's other findings. (ALJ Dec. 23; *see* ALJ Dec. 7, 8 & n.7, 9, 11, 21, 22, 25, 26; GC Ex. 2-3, 9-10; Tr. 62:17-65:20, 94:7-12, 95:5-24, 110:6-25, 134:21-24, 180:11-20, 217:15-19, 225:8-19, 239:7-241:5, 243:17-25, 256:4-7, 259:11-260:2.)

40. Bodega Latina excepts to the ALJ's conclusion that a "delay of paid time off" is an adverse employment action as contrary to Board law. (ALJ Dec. 23, 31.)

41. Bodega Latina excepts to the ALJ's finding that "when Beltran asked Respondent why she was denied her time-off request, Manager Luna handed her the Manager Luna antiunion email," as contrary to the record evidence. (Beltran did not ask Luna why she was denied her time off request, she asked for her vacation hours). (ALJ Dec. 23, *see* Tr. 136:22-137:8.)

42. Bodega Latina excepts to the ALJ's finding that "[t]he email makes it clear that Beltran had sufficient unused accrued vacation hours to get paid," as contrary to the record evidence where Beltran asked for a weeks' worth of vacation. (ALJ Dec. 23; *see* R. Ex. 1; GC Ex. 5, 10; Tr. 243:17-25, 246:15-21, 248:10-16.)

43. Bodega Latina excepts to the ALJ's finding that "the email also shows that the time-off request was denied because of Beltran's union activities," as unsupported by the record evidence. (ALJ Dec. 23; *see* evidence cited throughout Exceptions and Brief in Support of Exceptions.)

44. Bodega Latina excepts to the ALJ's finding that "Respondent routinely approved other employees' time-off requests other than Beltran who Manager Luna noted was prounion in

his recommendation that Beltran's March 22 time-off request be denied," as unsupported by the record evidence. (ALJ Dec. 23; *see* GC Exs. 2, 3, 9, 10; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 179:25-180:20, 193:3-194:15, 198:5-11, 217:8-218:8, 225:8-19, 233:5-11, 256:4-7, 259:11-260:2.)

45. Bodega Latina excepts to the ALJ's conclusion that "the General Counsel must prove by a preponderance of the evidence: (1) union activity by the employee; (2) employer knowledge of that activity; and (3) antiunion animus by the employer to establish antiunion motivation of employer's conduct in violation of Section 8(a)(3) and (1)," as contrary to a more appropriate standard that should require a fourth element of causal nexus. (ALJ Dec. 24.)

46. Bodega Latina excepts to the ALJ's conclusion "that beginning on March 22, 2016, or in about April 2016, Respondent refused employee Beltran's request to use accrued vacation hours to cover her emergency medical leave on March 23, 2016, because Beltran assisted the Union and engaged in union activities and to discourage employees from engaging in these activities and that these protected union activities resulted in Respondent discriminating in regard to the terms and conditions of employment of its employees, thereby discouraging membership in a labor organization violation of Section 8(a)(3) and (1) of the Act," as unsupported by record evidence and contrary to Board law. (ALJ Dec. 24; *see* Jt. Ex. 1; Tr. 173:17-174:5, 243:17-25; 248:2-16, 264:17-265:7.)

47. Bodega Latina excepts to the ALJ's conclusion that "Respondent knew about and openly witnessed and complained about Beltran's protected prounion activities," as unsupported by the record evidence and contrary to Board law. (ALJ Dec. 25; *see* GC Ex. 4; Tr. 225:8-15, 236:13-21, 237:2-7, 238:17-25, 239:7-241:5.)

48. Bodega Latina excepts to the ALJ's finding that "VP Santillan admitted that store managers, like Manager Luna, have the authority to grant employees' payout requests," as contrary to the record evidence. (ALJ Dec. 25; *see* Tr. 217:15-19.)

49. Bodega Latina excepts to the ALJ's finding that "I do not credit Supervisor Lima's testimony that VP Santillan or general counsel Angulo were responsible for approving employees' time-off requests and not Manager Luna, and, once again, I credit VP Santillan's admission that store managers such as Manager Luna have the authority to grant employees' time-off requests which is consistent with Beltran's testimony as to Manager Luna's call on March 25 or 26 telling her 30 that her March 22 time-off request had been denied and other documentary evidence showing that prior to Beltran's March 22 time-off request, it was common practice for store managers and Manager Luna, in particular, to authorize employees' time-off requests," as contrary to the record evidence and the ALJ's other findings. (ALJ Dec. 25; *see* ALJ Dec. 13; GC Exs. 2-4, 9, 10; Tr. 42:19-43:12, 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 153:4-24, 180:3-20, 217:15-19, 225:8-19, 226:22-227:15, 232:12-18, 233:16-19, 239:7-241:5, 256:4-7, 259:11-260:2.)

50. Bodega Latina excepts to the ALJ's finding that "Supervisor Lima essentially rubber-stamped Manager Luna's March 22 and 25, or 26 denials of Beltran's time-off request," as contrary to the record evidence. (ALJ Dec. 25; *see* GC Exs. 2, 3, 9, 10; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 180:11-20, 217:15-19, 225:8-19, 239:7-241:5, 238:17-25, 239:7-241:5, 256:4-7, 259:11-260:2.)

51. Bodega Latina excepts to the ALJ's finding that "Respondent harbored animus toward Beltran's protected prounion activities," and "[t]he evidence is replete with animus both

direct and circumstantial,” as contrary to the record evidence, the ALJ’s other findings, and Board law. (ALJ Dec. 26; *see* ALJ Dec. 29; Tr. 237:2-7, 238:17-25, 239:7-241:5, 243:17-25.)

52. Bodega Latina excepts to the ALJ’s finding that “[t]he Manager Luna antiunion email is direct evidence of Respondent’s union animus and discriminatory motive,” as contrary to the record evidence and Board law. (ALJ Dec. 26; *see* Jt. Ex. 1-3; Tr. 45:15-19, 106:18-22, 109:4-5, 112:24-113:8, 136:6-25, 137:1-5, 138:2-23, 225:8-15, 235:20-24, 236:13-237:7.)

53. Bodega Latina excepts to the ALJ’s finding that “Manager Luna . . . flaunted” the March 29 email to Beltran as unsupported by the record evidence. (ALJ Dec. 26; *see* Jt. Ex. 1-3; Tr. 45:15-19, 106:18-22, 109:4-5, 112:24-113:8, 136:6-25, 137:1-5, 138:2-23, 225:8-15, 235:20-24, 236:13-237:7.)

54. Bodega Latina excepts to the ALJ’s finding that the March 29 email “specifically informs Supervisor Lima that Beltran is a prounion employee at Respondent so that Supervisor Lima can factor that unlawful remark into her decision whether or not to affirm Manager Luna’s earlier denials on March 22, 25, or 26 of Beltran’s March 22 time-off request,” as unsupported by the record evidence. (ALJ Dec. 26; *see* Jt. Ex. 1; Tr. 19:9-22:19, 173:17-174:5, 178:12-24, 235:20-24, 238:17-25, 239:7-241:1, 243:13-25, 248:2-16, 256:4-7, 264:17-265:7.)

55. Bodega Latina excepts to the ALJ’s finding that Luna had a “prior policy and practice of approving employees’ time-off requests that come to him with less than 30 days’ notice,” as unsupported by the record evidence. (ALJ Dec. 26; *see* GC Exs. 2, 3, 9, 10; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 180:11-20, 217:15-19, 225:8-19, 239:7-241:5, 256:4-7, 259:11-260:2.)

56. Bodega Latina excepts to the ALJ’s finding that “If giving less than 30 days’ notice is a factor in denying Beltran’s time-off request, Respondent has violated the parties’

interim CBA which does not require at least 30 days' advance notice for vacation requests using vacation as part of FMLA circumstances as Beltran requested on March 22," as unsupported by the record evidence. (ALJ Dec. 26; *see* GC Exs. 2, 3.)

57. Bodega Latina excepts to the ALJ's finding that "Manager Luna's reference to Beltran being 'pro-union' as part of his recommendation to deny Beltran's March 22 time-off request is strong direct evidence of unlawful motivation, retaliation, and Respondent's union animus," as contrary to the record evidence. (ALJ Dec. 26, 30; *see* Jt. Ex. 1; Tr. 19.9-22:19, 173:17-174:5, 178:12-24, 235:20-24, 238:17-25, 239:7-241:1, 243:13-25, 248:2-16, 256:4-7, 264:17-265:7.)

58. Bodega Latina excepts to the ALJ's finding that Bodega Latina treated Beltran disparately from other employees as unsupported by the record evidence and Board law. (ALJ Dec. 26-27; *see* GC Exs. 2, 3, 9, 10; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 180:11-20, 217:15-19, 225:8-19, 239:7-241:5, 256:4-7, 259:11-260:2.)

59. Bodega Latina excepts to the ALJ's finding that "[t]he delayed payment from late March or early April to June 24 deprived Beltran of the use of this money to put toward supporting herself while recovering from surgery in late March 2016. Beltran has lost opportunity costs not having access to her own money in the form of unused accrued vacation hours owed to her by Respondent," as unsupported by the record evidence. (ALJ Dec. 27 n. 26; *see* Jt. Ex. 1-3.)

60. Bodega Latina excepts to the ALJ's conclusion that "the Board does not require that General Counsel demonstrate a causal 'nexus' between an employee's protected activity and an employer's adverse action," as contrary to a proper interpretation of Board law. (ALJ Dec. 27.)



61. Bodega Latina excepts to the ALJ's finding that "Supervisor Luna's direct disclosure to Supervisor Lima of Beltran. being 'pro-union' in his March 29 Manager Luna antiunion email establishes a causal link and motivating factor between Beltran's prounion activities in late December 2015 and January 2016 and Manager Luna's denial of Beltran's March 22 time-off request," as contrary to the record evidence. (ALJ Dec. 27; *see* Jt. Ex. 1; Tr. 19:9-22:19, 173:17-174:5, 178:12-24, 235:20-24, 238:17-25, 239:7-241:1, 243:13-25, 248:2-16, 256:4-7, 264:17-265:7.)

62. Bodega Latina excepts to the ALJ's finding that "[t]here is sufficient circumstantial evidence of Respondent's union animus," and that "the strong evidence of pretextual reasons for Respondent's adverse discriminatory action against Beltran and the close timing of this adverse action in relation to the timing of Beltran's union activities also supports a finding of animus toward Beltran's protected union activity," as contrary to the record evidence and Board law. (ALJ Dec. 27; *see* Tr. 237:2-7, 238:17-25, 239:7-241:5, 243:17-25.)

63. Bodega Latina excepts to the ALJ's findings that Bodega Latina gave "shifting characterizations," and of the characterizations the ALJ claims Bodega Latina proffered as contrary to the record evidence. (ALJ Dec. 27, 28; *see* GC Ex. 6; Tr. 178:12-179:24, 194:3-9, 197:4-8, 197:18-22, 246:11-13.)

64. Bodega Latina excepts to the ALJ's finding that "Respondent routinely approved other time-off requests to employees other than Beltran in March and April despite the same Respondent settlement with the Union Locals and Respondent's future payments to employees of undisclosed timing on April 8 and June 24," as unsupported by the record evidence. (ALJ Dec. 28; *see* GC Exs. 2, 3, 9, 10; Tr. 94:7-12, 95:5-24, 62:17-65:20, 134:21-24, 180:11-20, 217:15-19, 225:8-19, 239:7-241:5, 256:4-7, 259:11-260:2.)

65. Bodega Latina excepts to the ALJ's findings and conclusions that Bodega Latina "denied Beltran's March 22 time-off request due to Beltran's 'union activities' . . . by not processing it to payroll as was [Luna's] normal custom and practice in 2015 and 2016[,] . . . call[ing] her at her home when she was recovering from her emergency surgery," and "persuad[ing] Supervisor Lima and Respondent to maintain Manager Luna's prior denials of Beltran's March 22 time-off request and delay payment of it until June 24, 2016," as contrary to the record evidence. (ALJ Dec. 28; *see* GC Exs. 2-4, 9, 10; Tr. 19:9-22:19, 42:19-43:12, 95:5-24, 134:21-24, 139:12-141:22, 153:4-24, 178:12-179:24, 217:15-19, 225:8-15, 226:22-227:15, 232:12-18, 233:16-19, 238:17-25, 239:7-241:5, 243:17-25, 259:11-260:2.)

66. Bodega Latina excepts to the ALJ's finding that "Respondent's attitude toward Beltran's pro-union status, the timing of her time-off request, and her use of sick leave is highly indicative of animus," as contrary to the record evidence. (ALJ Dec. 28; *see* Tr. 236:13-237:7, 243:17-25.)

67. Bodega Latina excepts to the ALJ's findings that "[t]he timing of Manager Luna's denial of Beltran's time-off request to her union activities also shows anti-union motivation," as contrary to the record evidence and Board law. (ALJ Dec. 29; *see* Jt. Ex. 1; Tr. 104:11-105:7, 105:11-22, 225:8-15, 238:17-25, 239:7-241:5, 245:22-25.)

68. Bodega Latina excepts to the ALJ's conclusions distinguishing the cases Bodega Latina cited, as the cases are not in fact distinguishable. (ALJ Dec. 29.)

69. Bodega Latina excepts to the ALJ's finding that Bodega Latina did not show that "it would have delayed payment of Beltran's March 22 time-off request for payment of unused accrued vacation hours," in absence of her union activity, and that Bodega Latina "did not present any evidence of proper motivation [and] legitimate and substantial business

justification,” as contrary to the record evidence and Board law. (ALJ Dec. 29, 30, 31; *see* Jt. Ex. 1; Tr. 173:17-174:5, 243:13-25, 248:2-16, 256:4-7, 264:17-265:7.)

70. Bodega Latina excepts to the ALJ’s conclusion that the CGC established a *prima facie* case as contrary to the record evidence and Board law. (ALJ Dec. 29; *see* evidence cited throughout Exceptions and Brief in Support of Exceptions.)

71. Bodega Latina excepts to the ALJ’s conclusions that Bodega Latina’s reasons for not paying the additional vacation payout were “pretextual” as contrary to the record evidence and Board law. (ALJ Dec. 30, 31; *see* Jt. Ex. 1; Tr. 173:17-174:5, 243:13-25, 248:2-16, 256:4-7, 264:17-265:7.)

#### **Equating a Time-Off Request with a Payout Request**

72. The ALJ’s findings and conclusions repeatedly equate an employee’s request to take paid vacation time off with a request to receive a payout for unused, accrued vacation pay. (*See, e.g.*, ALJ Dec. 1 (referring to “Beltran’s March 22 time-off request”), 4 (“When an employee gives less than 30 days’ notice, this type of time-off request is referred to as a ‘payout.’”), 4 (equating employees “request[ing] time off with vacation pay” with “Beltran’s March 22 time-off request”), 4 n.6, 9, 11, 12, and *passim*.) Such findings and conclusions are contrary to the record evidence, as they are two different requests and Bodega Latina handles a request to take paid vacation time off differently than a request to receive a payout for unused, accrued vacation pay. (*See* Tr. 259-60 (describing a “payout” as “when they’re requesting to be paid when *they’re not on vacation*” and describing the separate process for such requests); *see* GC Ex. 2, 3, 10; Tr. 179:25-180:20, 193:3-194:15, 198:5-11, 217:8-218:8, 225:8-15; 233:5-11, 259:11-260:2.)

### **The March 29 Email**

73. Bodega Latina excepts to the ALJ's finding that "[h]anding Beltran the Manager Luna antiunion email sent Beltran and other employees a clear message that employees' prounion activities could negatively impact their employment including the right to use their unused accrued 30 vacation hours in violation of their Section 7 rights," as contrary to the record evidence and Board law. (ALJ Dec. 30; *see* Jt. Ex. 1-3; Tr. 45:15-19, 106:18-22, 109:4-5, 112:24-113:8, 136:6-25, 137:1-5, 138:2-23, 225:8-15, 235:20-24, 236:13-237:7.)

74. Bodega Latina excepts to the ALJ's finding that "by providing Beltran with the Manager Luna antiunion email in April after Manager Luna had already denied Beltran's March 22 time-off request, Manager Luna demonstrated to her the downside or negative repercussions that had, and would continue to come her way, if Beltran continued her union activities," as contrary to the record evidence and Board law. (ALJ Dec. 30; *see* Jt. Ex. 1-3; Tr. 45:15-19, 106:18-22, 109:4-5, 112:24-113:8, 136:6-25, 137:1-5, 138:2-23, 225:8-15, 235:20-24, 236:13-237:7.)

75. Bodega Latina excepts to the ALJ's finding that "[t]his antiunion email includes Manager Luna's advocacy against Beltran's request to use her vacation towards her medical leave on the grounds that she 'is pro union,'" as contrary to the record evidence. (ALJ Dec. 30-21; *see* Jt. Ex. 1-3; Tr. 45:15-19, 106:18-22, 109:4-5, 112:24-113:8, 136:6-25, 137:1-5, 138:2-23, 225:8-15, 235:20-24, 236:13-237:7.)

76. Bodega Latina excepts to the ALJ's finding that "[a]ny reasonable employee would interpret this email to show that Manager Luna was hostile toward Beltran's union activities and would take and continue to take adverse employment actions against Beltran and other employees on account of their union activities," as contrary to the record evidence and

Board law. (ALJ Dec. 31; *see* Jt. Ex. 1-3; Tr. 45:15-19, 106:18-22, 109:4-5, 112:24-113:8, 136:6-25, 137:1-5, 138:2-23, 225:8-15.)

77. Bodega Latina excepts to the ALJ's finding "that Beltran's receipt of this antiunion email chain from Manager Luna—the highest-ranking manager at her store—and the email's communication that Manager Luna thinks that union support is a reason to deny Beltran's request for vacation leave, would tend to discourage further union support," as contrary to the record evidence and Board law. (ALJ Dec. 31; *see* Jt. Ex. 1-3; Tr. 45:15-19, 106:18-22, 109:4-5, 112:24-113:8, 136:6-25, 137:1-5, 138:2-23, 225:8-15.)

78. Bodega Latina excepts to the ALJ's finding that "by giving employee Beltran a copy of the antiunion email, Respondent interfered with, restrained, or coerced employees in the exercise of the rights guaranteed in Section 7," as contrary to the record evidence and Board law. (ALJ Dec. 31; *see* Jt. Ex. 1-3; Tr. 45:15-19, 106:18-22, 109:4-5, 112:24-113:8, 136:6-25, 137:1-5, 138:2-23, 225:8-15.)

### **ALJ's Evidentiary Rulings**

79. Bodega Latina excepts to the ALJ's ruling prohibiting Bodega Latina from calling Beltran's memory of the March 25 or 26 phone call with Luna into question on cross examination as unsupported by reason, contrary to the record evidence, and infringing on Bodega Latina's due process rights. (ALJ Dec. 11 n.12; *see* ALJ Dec. 13; GC. Ex. 4; Tr. 42:19-43:12, 139:12-141:22, 153:4-24, 226:22-227:15, 232:12-18, 233:16-19.)

80. Bodega Latina excepts to the ALJ's ruling admitting settlement communications in this case as contrary to Board law, the Federal Rules of Evidence, and the ALJ's other rulings. (Tr. 7:22-10:5; *see* ALJ Dec. at 18 (finding other settlement discussions inadmissible under FRE 408).)

81. Bodega Latina excepts to the ALJ's imposing adverse inferences on Bodega Latina for not calling General Counsel Joe Angulo or former Store Director Jose Luna as contrary to Board law and the ALJ's other findings. (ALJ Dec. 19-20; *see* ALJ Dec. 7, 8 & n.7, 9, 21, 22, 25, 26; R. Ex. 2; GC Ex. 4; Tr. 19:9-22:19, 140:19-20, 178:12-179:24, 252:21-253:2.)

82. Bodega Latina excepts to the ALJ's credibility rulings that, in essence, find all of the GC's witnesses were to be believed in full, even where their testimony contradicted themselves and documentary evidence, and that none of Bodega Latina's witnesses were to be believed, even where no other evidence contradicted their testimony and their testimony was supported by documentary evidence. (ALJ Dec. 20-23; *see* evidence cited throughout Exceptions in Brief in Support.)

### **Miscellaneous Rulings**

83. Bodega Latina excepts to the ALJ's finding that "Respondent did not cite in its brief, however, any case law in support of this defense," as contrary to what was in Bodega Latina's post-trial brief. (ALJ Dec. 31.)

84. Bodega Latina excepts to the ALJ's finding that "I find that the nonpayment of a vacation pay benefit, even if subsequently remedied, is not a de minimis violation of the Act," as contrary to Board law. (ALJ Dec. 31.)

### **Conclusions of Law**

85. Bodega Latina excepts to the ALJ's conclusions of law 3-5 for the reasons stated in the foregoing Exceptions and its Brief in Support of Exceptions.

### **Remedies, Order, & Notice to Employees**

86. Bodega Latina excepts to the ALJ's finding that "Respondent has waived its position as to the March 11, 2016 settlement," as contrary to the record evidence. (ALJ Dec. 32;

*see* Tr. 7:15-8:2; Bodega Latina’s Post Trial Brief at 20-21 (Exhibit A to the Brief in Support of Exceptions).)

87. Bodega Latina excepts to the ALJ’s ordering a notice reading, by General Counsel Joe Angulo or Bodega Latina’s current general counsel, at all seven unionized stores in Southern California, as contrary to the record evidence and Board law as described in the foregoing exceptions and Brief in Support. (ALJ Dec. 32-33.)

88. Bodega Latina excepts to the ALJ’s conclusion that Bodega Latina “is a recidivist Act violator,” that a notice reading “is necessary to dissipate as much as possible any lingering effects of the Respondent’s unfair labor practices,” and that Bodega Latina “has a high disregard for the Act,” as unsupported by the record evidence and Board law as described in the foregoing exceptions and Brief in Support. (ALJ Dec. 32.)

89. Bodega Latina excepts to the ALJ’s ordering a notice posting at all seven unionized Southern California stores as unsupported by the record evidence and Board law as described in the foregoing exceptions and Brief in Support. (ALJ Dec. 34.)

90. Bodega Latina excepts to the ALJ’s cease and desist order as unsupported by the record evidence and Board law as described in the foregoing exceptions and Brief in Support. (ALJ Dec. 33.)

91. Bodega Latina excepts to the language of the Notice to Employees as unsupported by the record evidence and contrary to Board law as described in the foregoing exceptions and Brief in Support. (ALJ Dec. Appendix.)

DATED this 29th day of January 2018.

STEPTOE & JOHNSON LLP

By /s/ Steven D. Wheelless

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Attorneys for Bodega Latina



### CERTIFICATE OF SERVICE

The undersigned certifies that I filed an electronic copy of the foregoing via the Board's electronic filing service on January 29, 2018, to:

Gary Shinnars  
Executive Secretary  
National Labor Relations Board  
1099 14th Street N.W.  
Washington D.C. 20570

The undersigned certifies that I served a copy of the foregoing via email on January 29, 2018, to:

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National Labor Relations Board, Region 21  
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/s/ Paulette Mattar